No. 82-1577

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., *ET AL.*,

Appellants,

v.

AGRICULTURAL MARKETING AND BARGAINING BOARD, *ET AL.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF OF THE AMERICAN FROZEN FOOD INSTITUTE AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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On Behalf of *Amicus Curiae*
American Frozen Food Institute

December 1, 1983

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STATEMENT OF INTEREST OF THE AMERICAN FROZEN FOOD INSTITUTE

The American Frozen Food Institute submits this brief *amicus curiae*[1] in support of appellants' position that the Michigan Supreme Court erred in holding that provisions of Michigan's Agricultural Marketing and Bargaining Act (Mich. Comp. Laws §§ 290.701-.726 (Supp. 1982)) ("Michigan Act"), were not preempted by the Federal Agricultural Fair Practices Act of 1967 (7 U.S.C. §§ 2301-2306 (1982)) ("Federal Fair Practices Act").

The American Frozen Food Institute ("AFFI") is a national nonprofit trade association representing frozen food processors

[1] The brief is filed with the consent of the parties pursuant to Rule 36.2. Letters containing the consent of the parties have been filed with the Clerk of the Court.

that account for approximately 80 percent of the United States frozen food production. Many AFFI members negotiate for the purchase of agricultural commodities with producer bargaining associations, with individual producers who have not joined a bargaining association, and, under certain circumstances, with individual producers who are members of an association, such as where the association has no exclusive marketing contract with its members. The Michigan Act imposes severe restrictions on AFFI members' negotiating and purchasing practices by prohibiting producers, in specified situations, from selling a commodity at a price other than that fixed in a contract between an association of producers and a purchaser, and by prohibiting purchasers from negotiating with individual producers.

Specifically, the Michigan Act provides for the formation and operation of a producer bargaining association that is the exclusive bargaining and marketing agent for all the producers of an agricultural commodity in a bargaining unit. An association composed of more than 50 percent of the producers of an agricultural commodity, producing more than 50 percent of the quantity of such commodity in the bargaining unit, may become the exclusive bargaining and marketing agent for all producers in the unit, including those who have not voluntarily joined the association as members. Nonmembers as well as members are bound by the terms and conditions of the marketing contract negotiated by the association with a purchaser. All producers in the bargaining unit must pay fees to the producer association even though they do not wish to join or surrender their freedom to negotiate individually with purchasers.

Under certain conditions, the Michigan Act requires purchasers of commodities, referred to as "handlers," to bargain with the association. Once the association enters a contract with a handler on behalf of the bargaining unit, under no circumstances may handlers negotiate directly and individually with any producer included in that unit, regardless of whether the producer is or is not a member of the bargaining association. *Michigan Canners & Freezers Ass'n, Inc.* v. *Agricultural Marketing & Bargaining Board*, 416 Mich. 706, 715, 332 N.W.2d 134, 137-38 (1982) ("*Michigan Canners*"); Mich. Comp. Laws §§ 290.704(1)(g) and (h); 290.707(c); 290.710; 290.713 (Supp. 1982).

Thus, the Michigan Act interferes with a basic principle underlying our economic system – the right of a buyer to choose among competing sellers of goods and services and the right of a seller to choose among competing purchasers, in order to negotiate the best prices and terms. Through the mechanism of an exclusive bargaining agent, handlers are prohibited from negotiating with individual producers in a bargaining unit who would normally be in competition with each other. Producers are effectively coerced into joining a producer association and, in any event, are required to sell their produce only on terms and conditions set by the exclusive bargaining agent. The freedom of a producer to negotiate individually with a handler, or to join with competing producers in the marketing of his commodities, and the freedom of a handler to choose among competing sellers, are rights conferred and protected by the Federal Fair Practices Act and interfered with by the Michigan Act.

Because the ability of producers and handlers to negotiate with each other individually is eliminated in favor of uniform terms covering all producers in a bargaining unit, AFFI members and consumers will face restricted availability of, and pay higher prices for, agricultural commodities than if competition were not curtailed.[2]

SUMMARY OF ARGUMENT

Under the Supremacy Clause, state legislation that is in conflict with a federal statute, or thwarts its objectives, is preempted. *See, e.g., Fidelity Savings & Loan Ass'n* v. *De La Cuesta*, ____ U.S. ____, 102 S.Ct. 3014, 3022 (1982). The Michigan Supreme Court's holding that provisions of the Michigan Agricultural Marketing and Bargaining Act were not in conflict with the terms and objectives of the Federal Agricultural Fair Practices Act of 1967 is based upon an erroneous interpretation of the Federal Act and is erroneous for at least five distinct

[2] Prior to the Michigan Supreme Court decision now before this Court, the Michigan Supreme Court remanded the matter to the Circuit Court for findings of fact as to the effect of the Michigan Act. The Circuit Court found that under the Michigan Act "the consumer will experience . . . increased food prices." (J.S. App. A67).

reasons. In fact, a direct conflict exists between the Federal Fair Practices Act and provisions of the Michigan Act requiring that provisions of the Michigan Act be invalidated.

The Michigan court's construction of the Federal Fair Practices Act did not take into consideration the Capper-Volstead Act, which confers a right on producers to join together voluntarily in producer associations. The purpose of the subsequently enacted Federal Fair Practices Act was to protect this right free from coercion. Because the court below failed to recognize the relationship between the two acts, it wrongfully concluded that the Federal Fair Practices Act did not prohibit producer association coercion as authorized by the Michigan Act.

Further, the Federal Fair Practices Act expressly prohibits "handlers" from coercing producers into joining producer associations. The term "handler" is statutorily defined as encompassing producer associations. 7 U.S.C. § 2302(a). The decision of the court below fails to give effect to this definition.

The Michigan court's interpretation of the Federal Fair Practices Act as permitting the state to authorize anticompetitive conduct is in conflict with the Sherman Act. Uniform pricing and other concerted conduct involving producers who have not voluntarily agreed to cooperate, as authorized by the Michigan Act, is not state action exempt from the Sherman Act. Because of the importance of the policies underlying the federal antitrust laws, the Federal Fair Practices Act should have been construed in a manner consistent with the Sherman Act so as to preempt conflicting state requirements.

Similarly, the interpretation below of the Federal Fair Practices Act, as authorizing conduct compelling producers to support producer associations and prohibiting producers and purchasers from directly dealing with each other, violates First Amendment rights. The Federal Fair Practices Act should have been construed in a manner consistent with the exercise of First Amendment rights, which would require the preemption of the provisions of the Michigan Act in conflict with those rights.

The "existing State law" provision of the Federal Fair Practices Act, 7 U.S.C. § 2305(d), was misconstrued to be an

indication of Congressional intent to permit states to regulate conduct inconsistently with the Act. The terms and legislative history of this provision demonstrate no such intent, but rather the limited purpose of preserving certain state remedies to supplement the Federal Fair Practices Act's protections.

ARGUMENT

The Court Below Erred In Construing The Federal Agricultural Fair Practices Act As Not Preempting The Michigan Agricultural Marketing And Bargaining Act

The Michigan Supreme Court concluded that the Federal Fair Practices Act did not conflict with the Michigan Act and, therefore, ruled that federal legislation did not preempt the state legislation. This conclusion was based upon an erroneous interpretation of the Federal Fair Practices Act. It is erroneous for at least five separate reasons.

A. The Interpretation Of The Federal Fair Practices Act Fails To Give Proper Consideration To The Capper-Volstead Act

The Capper-Volstead Act, 7 U.S.C. §§ 291-292 (1982), expressly creates the right of producers voluntarily to join with other producers in marketing their products. The act provides that "[p]ersons engaged in the production of agricultural products as farmers . . . *may* act together in associations, corporate or *otherwise*, . . . in collectively . . . marketing . . . such products. . . ." 7 U.S.C. § 291 (emphasis added). This act has been construed as creating a right of producers voluntarily to join with other producers free of coercion from others, including producers acting individually or through associations. *See, e.g., United States* v. *Dairyman, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Fairdale Farms, Inc.* v. *Yankee Milk, Inc.*, 635 F.2d 1037, 1044 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

The Federal Fair Practices Act, enacted in 1968, supplements the Capper-Volstead Act, enacted in 1922, and was designed principally to prevent coercion or other unfair interference with agricultural producers voluntarily joining and participating

in bargaining associations. The Federal Fair Practices Act, by its terms and legislative history, clearly reaffirms and protects the right of a producer to join or not to join with other producers, free from coercion, in marketing activities. The failure of the decision below to give weight to the provisions and policy of the related Capper-Volstead Act in interpreting the Federal Fair Practices Act was in error, leading the Michigan court wrongfully to uphold the validity of the Michigan Act.

By its express terms, the Federal Fair Practices Act provides that producers have a right to join or not to join with others to form producer associations. Section 2301 formally declares as Congressional policy that individual farmers, in order to improve their marketing and bargaining position, "are *free* to join together *voluntarily* in cooperative organizations. . . ." 7 U.S.C. § 2301 (emphasis added). Section 2303(a) further provides that a producer has a "right to join and belong to or *to refrain from joining or belonging to* an association of producers," and protects this right from interference by "handlers." 7 U.S.C. § 2303(a) (emphasis added).[3]

The legislative history amplifies this right. For example, the report of the Senate Committee on Agriculture and Forestry states:

> This bill is designed to protect the agricultural producer's *right* to decide, *free from improper pressures*, whether or not he wishes to belong to a marketing or bargaining association.

S. Rep. No. 474, 90th Cong., 1st Sess. (1967), *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867 (emphasis supplied). During the Senate Subcommittee Hearings, Senator Williams, a proponent, noted, "Freedom of choice of any farmer to join or not to join an organization of his choice is a basic American right and it must be protected." *Agricultural Producers Marketing Act: Hearings on S. 109 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on*

[3] The Federal Fair Practices Act also confirms the right of producers and handlers to select their own customers and suppliers, 7 U.S.C. § 2304.

Agriculture and Forestry, 90th Cong., 1st Sess. 10 (1967). *See also* 114 Cong. Rec. 7449-51 (1968) (statements of Reps. Latta, Poage, and May).

Under the Michigan Act, as interpreted by the Michigan Supreme Court, an association comprised of more than 50 percent of the producers in a bargaining unit, which represents more than 50 percent of the commodity produced in that bargaining unit, may become the exclusive bargaining and sales agent for all of the producers in the unit.[4] Thus, the association may include up to 49 percent of producers who have chosen not to join or enter into marketing contracts with the association. Producers who may choose not to join the association voluntarily are effectively pressured to do so as all producers must support the association by paying a service fee, must sell their commodities only at the price set by the association, and are prohibited from negotiating directly with any handler. *Michigan Canners*, 416 Mich. at 715, 332 N.W.2d at 137-38.

The Michigan Act expressly authorizes activities that coerce producers to join producer associations, and thus conflicts with the objective of the Federal Fair Practices Act and its antecedent statute the Capper-Volstead Act – to provide producers

[4] Under the Michigan Act, a producer association may become the exclusive bargaining agent only after accreditation by a five member Agricultural Marketing and Bargaining Board appointed by the state. This board, upon petition of not less than 10% of the producers of the commodity eligible for membership in the proposed bargaining unit, as defined in the association's petition for accreditation, shall determine, after a public hearing, the appropriateness of the proposed bargaining unit in terms of commodity and geographic area. An association must be accredited if it meets specified criteria, including that the bargaining unit has contracts which cover more than 50% of the quantity of that commodity produced in the bargaining unit which involve more than 50% of the producers of that commodity in that unit. Upon petition of at least 1/3 of the producers in the proposed unit, producing at least 1/3 of the commodity in the proposed unit, a referendum of all producers in the unit shall be held. The association will remain accredited if the referendum is approved by more than 50% of the producers in the unit producing more than 50% of the quantity of the commodity. Mich. Comp. Laws §§ 290.703-.704, 290.706-.707, 290.710.

with a right to voluntarily join or not to join, free of coercion, with other producers in bargaining activities. Accordingly, the state legislation must give way to the federal. *See, e.g., Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

B. The Interpretation Of The Federal Fair Practices Act Fails To Give Effect To The Statutory Definition Of "Handler"

The Federal Fair Practices Act prohibits coercive conduct by "handlers." The Michigan Court construed the term "handler" as not including producer associations. However, placing producer association conduct outside of the scope of the Federal Fair Practices Act is inconsistent with the statutory definition of "handler."

> (a) The term "handler" means *any person* engaged in the business or practice of . . . (3) contracting or *negotiating contracts or other arrangements . . . on behalf of producers . . . with respect to* the production or *marketing* of any agricultural product. . . .

7 U.S.C. § 2302 (1982) (emphasis added). The term "person" is defined to include "associations." 7 U.S.C. § 2302(d). The definition of "handler" is sufficiently broad to encompass producer associations and has been so construed by the federal courts. *See Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227, 235 (N.D. Ohio 1974); *Marketing Systems Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1024 (S.D. Tex. 1972). The definition of "handler" in the Michigan Act, which expressly excludes producer associations, is inconsistent with that of the Federal Fair Practices Act. Mich. Comp. Laws §§ 290.702(a) and (g).

The legislative history of the Federal Fair Practices Act demonstrates the Congressional intent to include producer associations within the meaning of handlers so that the prohibitions against conduct pressuring producers to join associations are also applicable to associations of producers. The original language of the bill which became the Federal Fair Practices Act, S. 109, 90th Cong., 1st Sess. 9 (1967), stated:

> Sec. 4 It shall be unlawful for any handler or association of producers knowingly to engage . . . in the following practices:
>
> (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers. . . .

113 Cong. Rec. 21,410 (1967).

The Senate Report noted:

> The objective of the bill is to protect the producer in the exercise of a free choice. Many witnesses suggested that the bill did not fully accomplish this purpose, because it protected the producer only from improper pressure not to join an association. To protect his free choice *he should also be protected from* improper pressure in the other direction, *improper pressure to join an association*. The Committee . . . was convinced . . . that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction.

S. Rep. No. 474, 90th Cong., 1st Sess. 5 (1967), *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1871 (emphasis added).

The House Committee on Agriculture initially rejected a proposal "to delete the application of any prohibited practices . . . to associations of producers. . . ." H.R. Rep. No. 824, 90th Cong., 1st Sess. 4 (1967). However, the House subsequently deleted the phrase "or association of producers" from Section 4 of H.R. 13541, 90th Cong., 1st Sess. (1967), at the suggestion of the Committee on Rules. *See* 114 Cong. Rec. 7449 (1968). The reason for this deletion was explained by Representative Sisk on behalf of the Rules Committee:

> *Since the bill already makes clear that associations of producers are not excluded from*

> *the term "handler,"* this phrase is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers. This is not the intent; and while my amendments do not change the purpose or basic meaning of the bill, they make misinterpretations more difficult.

114 Cong. Rec. 7464 (1968) (emphasis added). The Chairman of the House Committee on Agriculture, Representative Poage, described the bill as "a two-way street – to make of it a protector of the right of the producer to determine for himself whether he cared to or did not care to become a member of a cooperative." 114 Cong. Rec. 7451 (1968).[5] Thus, the express statutory terms and the legislative history demonstrate a clear intention by Congress to prohibit coercive conduct by producer bargaining associations as well as other handlers. Because the producer associations created under the Michigan Act negotiate contracts on behalf of all producers in the bargaining unit, such an association falls within the definition of "handler" as defined in 7 U.S.C. § 2302. Therefore, it is a violation of the Federal Fair Practices Act for that producer association to "coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers. . . ." 7 U.S.C. § 2303(a). The Michigan Act clearly sanctions such coercion prohibited by the Federal Fair Practices Act, since all producers in a bargaining unit must financially support the producer association, must sell their commodities only at the terms set by the producer association, and are barred from negotiating directly with a handler. Accordingly, the state's legislation must yield to the federal. *Fidelity Savings & Loan Ass'n* v. *De La Cuesta,* ____ U.S. ____, 102 S.Ct. 3014, 3022 (1982).

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[5] One of the reasons advanced for preserving the producer's right not to join an association was that the "fees being charged by these associations are no small matter to the farmer." 114 Cong. Rec. 7450 (1968) (remarks of Rep. Latta).

C. The Interpretation Of The Federal Fair Practices Act Fails To Give Proper Consideration To The Sherman Act

The Michigan Act authorizes private parties to engage in anticompetitive conduct. For example, all producers in a bargaining unit, even those who did not voluntarily join, must utilize the producer association as exclusive bargaining agent and are bound by the prices it negotiates. Handlers are expressly prohibited from seeking to negotiate individually with any producer in the bargaining unit. Mich. Comp. Laws §§ 290.704(1)(h); 290.707(c); 290.710(1) and (2). This concerted action by all producers in setting prices and marketing a commodity is clearly violative of the Sherman Act. 15 U.S.C. §§ 1 *et seq.* (1982). The court below erred in interpreting the Federal Fair Practices Act as permitting the states to authorize conduct that contravenes the Sherman Act.

The Federal Fair Practices Act contains no express provision sanctioning conduct in violation of the federal antitrust laws by producers who have not agreed to voluntarily join together. It is well settled that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored. . . ." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963). There is no basis to imply a repeal here for such conduct. To the contrary, the Federal Fair Practices Act, when read in conjunction with the Capper-Volstead Act, *supra*, in part A, demonstrates an intention by Congress not to grant broad antitrust immunity.

This Court has held that the Capper-Volstead Act provides for a limited repeal of the antitrust laws. *See Maryland & Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458 (1960); *United States* v. *Borden Co.*, 308 U.S. 188, 203-06 (1939). This repeal is restricted to concerted activity in processing, handling and marketing agricultural commodities by producers who choose voluntarily to join together for such purposes. *See Maryland & Virginia Milk Producers Ass'n*, 362 U.S. at 464-67. This repeal does not extend to conduct by producers to coerce other producers into concerted activities. *See, e.g., United States* v. *Dairyman, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981);

Fairdale Farms, Inc. v. *Yankee Milk, Inc.*, 635 F.2d 1037, 1044 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

In *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816 (1978), this Court held that the Capper-Volstead Act granted limited immunity from antitrust liability for those concerted activities that were conducted solely by producers who were authorized under that act to join together. Where some of the persons acting jointly were not so authorized, the activity was proscribed by the Sherman Act. The concerted activity authorized by the Michigan Act involves joint action by producers who have voluntarily agreed to cooperate, which is exempt from the antitrust laws by the Capper-Volstead Act, and joint action by producers who have not voluntarily agreed to cooperate, which is not exempt. The concerted activity of all producers is thus outside the scope of the limited antitrust immunity of the Capper-Volstead Act.

The Michigan Supreme Court's interpretation of the Federal Fair Practices Act as not precluding the anticompetitive conduct authorized by the Michigan Act is, therefore, inconsistent with these cases specifically addressing the extent of antitrust immunity for joint action by producers, and is contrary to the general principle that any exemption from the antitrust laws is to be strictly construed. *Federal Maritime Comm'n* v. *Sea Train Lines, Inc.*, 411 U.S. 726, 733 (1973); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).

The concerted activities authorized by the Michigan Act of producers who have voluntarily joined together and those who have not, do not constitute "state action" falling outside of the Sherman Act. *Parker* v. *Brown*, 317 U.S. 341 (1943).[6] The Michigan Act merely authorizes private parties, producer associations and handlers, to enter into exclusive marketing contracts which bind not only members of the producer association, but all producers within the bargaining unit. These contracts set the terms and conditions, including price. Since the "State

[6] The "state action" doctrine appears to have been relied upon by the court below as justification for its upholding the validity of the Michigan Act. *Michigan Canners*, 416 Mich. at 719 n.13, 332 N.W.2d at 139-40 n.13.

neither establishes prices nor reviews the reasonableness of the price schedule; nor does it regulate the terms of . . . contracts," such conduct is not state action exempt from the Sherman Act. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980). As in *Midcal* where this Court invalidated the state law, the state legislation "simply authorizes price setting and enforces the prices established by private parties." *Id.* at 105. *See Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951).

Because of the importance of the Sherman Act to the elemental principle of competition which underlies our economic system, it is necessary that other statutes affecting competition be construed, whenever possible, in harmony with it. The court below thus erred in interpreting the Federal Fair Practices Act so as to permit state legislation violative of the Sherman Act to be sustained.

D. The Interpretation Of The Federal Fair Practices Act Fails To Give Proper Consideration To The First Amendment

The Michigan Act's provisions compelling producers who do not voluntarily join a producer association to support that association financially, and prohibiting these producers, as well as handlers, from negotiating with one another individually, directly interfere with the right of suppliers and purchasers to choose those with whom they wish to deal and on what terms. The court below correctly noted that the legislation raised First Amendment concerns. *Michigan Canners*, 416 Mich. at 719 n.13, 332 N.W.2d at 139-40 n.13. Nevertheless, the Federal Fair Practices Act was construed as permitting the state to restrict the First Amendment rights of speech and association. Because of the importance of these rights, the Federal Fair Practices Act should be construed in a manner consistent with the full exercise of these rights, unless the Federal Fair Practices Act demonstrates the necessity for curtailing them, and a clear Congressional intent to do so. *See Abood* v. *Detroit Board of Education*, 431 U.S. 209, 222 (1977); *Railway Employees Department* v. *Hanson*, 351 U.S. 255 (1956). Since such a necessity and intent are absent here, the court below erred in construing the Federal

Fair Practices Act as permitting states to abridge the First Amendment rights of handlers and producers.

E. The Interpretation Of The Federal Fair Practices Act Misconstrues The "Existing State Law" Provision Of That Act

The final clause of the Federal Fair Practices Act states that: "The provisions of this chapter shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction." 7 U.S.C. § 2305(d). The Michigan Supreme Court indicated that this statement demonstrates a Congressional intent not fully to exercise authority in the agricultural marketing area and implied that the states were thereby given a greater latitude to legislate in the same area. *Michigan Canners, supra*, 416 Mich. at 714, 332 N.W.2d at 137. The court below misconstrued the purpose of this provision. Such a construction ignores the Congressional declaration that the Federal Fair Practices Act was intended to regulate not only interstate and foreign commerce, but commerce which may "directly burden or affect interstate commerce." 7 U.S.C. § 2301. The use of this language demonstrates Congress sought to exercise its authority under the Commerce Clause to the maximum constitutionally permitted. *See United States* v. *American Building Maintenance Industries*, 422 U.S. 271, 276, 279-81 (1975).

The "existing State law" provision was not intended to confer on the states the authority to regulate substantive conduct governed by the Federal Fair Practices Act in a manner inconsistent therewith. The legislative history discloses the purpose was merely to preserve existing state law remedies or causes of action, such as breach of contract or tortious interference with contracts – remedies which would supplement the Federal Fair Practices Act's protection of a producer's right voluntarily to contract with others free of interference. That such an interpretation is correct is confirmed by the House Committee Report accompanying H.R. 13541, the provisions of which were eventually incorporated, through amendment, into S. 109, 90th Cong., 1st Sess. (1967). In explaining the "existing State law" clause, the Report notes:

> This amendment was adopted to clarify the Committee's intent that no State law should be superceded or preempted by this legislation which is supplementary to and not in replacement of all other existing legal remedies.

H.R. Rep. No. 824, 90th Cong., 1st Sess. 4 (1967)[7]

In any event, even if the existing state law provision were construed as a Congressional intent to validate conflicting state law, the Michigan Act would still be preempted. The Michigan Act was not an "existing" state law since it was enacted four years after the Federal Fair Practices Act. Moreover, a review of the legislative history discloses discussion of only a few "existing"

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[7] The existing state law language was not added until the introduction of H.R. 13541 in 1967, which was later substantially incorporated as an amendment to S. 109. S. 109 was enacted as Pub. L. No. 90-288, 82 Stat. 93 (1968). Thus, the first bills introduced in the House and the Senate did not contain this language. H.R. 11146, 88th Cong., 2d Sess. (1964); S. 2849, 88th Cong., 2d Sess. (1964). Other bills prior to H.R. 13541 provided in part: "The foregoing provisions shall not be construed to deprive state courts of jurisdiction and actions for damages thereunder." H.R. 11146, 88th Cong., 2d Sess. (1964); H.R. 898, 89th Cong., 1st Sess. (1965); H.R. 5951, 89th Cong., 1st Sess. (1965); H.R. 4152, 90th Cong., 1st Sess. (1967); H.R. 6262, 90th Cong., 1st Sess. (1967). H.R. 13541, as introduced, merged this jurisdictional clause with an existing state law nonpreemption statement.

Similarly, the original Senate bill contained the jurisdictional provision quoted above. S. 2849, 88th Cong., 2d Sess. (1964). However, the Senate Subcommittee on Agricultural Research and General Legislation recommended that the entire jurisdictional clause be deleted from the successor bill S. 109. The Committee explained: "Some witnesses suggested that the above disclaimer was unnecessary and might be construed as authorizing double collection of damages." Staff of Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry, 90th Cong., 1st Sess. 10 (Comm. Print. No. 2 1967). As previously noted, the "existing State law" language introduced in H.R. 13541 was incorporated as an amendment to S. 109. 114 Cong. Rec. 8418-89 (1968). *See also* 1968 U.S. Code & Ad. News 1867, 1868.

state agricultural marketing acts.[8] Not one was similar to the Michigan Act in requiring the financial participation of nonproducer association members in bargaining units and eliminating the right of nonmembers to freely negotiate the terms or the sale of their own commodities. We are unaware of any state statute in existence prior to the enactment of the Federal Fair Practices Act which contained provisions similar to the Michigan Act.[9]

[8] *Discrimination Against Members of Farmer Cooperatives: Hearings on S. 109 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry*, 89th Cong., 2d Sess. 153-56 (1966) (statement of Robert D. Williams, Chairman of the California Senate Standing Committee on Agriculture) (California); *id.* at 11 (statement of Charles B. Schuman, President, American Farm Bureau Legislation) (Illinois); *Agricultural Producers Marketing Act: Hearings on S. 109 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry*, 90th Cong., 1st Sess. 197-98 (1967) (statement of Leonard G. Kunzman, Executive Secretary, Oregon Farm Bureau Federation) (Oregon).

[9] Even today the Michigan Act appears to be unique. Although many states have enacted legislation prohibiting conduct substantially similar to that prohibited under the Federal Fair Practices Act, we are unaware of any state that has enacted a regulatory scheme requiring nonmembers of an association to financially support and be bound by the contractual terms and conditions negotiated by an association. *See, e.g.*, N.J. Stat. Ann. §§ 4:13-1, 4:13-45 (West 1973); O.R. Rev. Stat. § 646.605 (1981); Indiana Agricultural Cooperative Act, Ind. Code Ann. § 15-7-1-1 (Burns 1973).

Some states have acts similar to the Michigan Act. For example, the Minnesota Agricultural Marketing and Bargaining Act of 1973, Minn. Stat. Ann. § 17.691 (West 1981), contains language almost identical to that of the Michigan Act. However, the Minnesota Act specifically provides that an association may not bargain for those producers who choose not to be represented by the association. Minn. Stat. Ann. § 17.694 Sub. 7 (West 1981). *See also* Maine Agricultural Marketing and Bargaining Act, Me. Rev. Stat. Ann. Tit. 13, § 1953 (1973) (no financial support requirement for nonmembers).

Some states have legislation providing for marketing orders of various agricultural commodities. *See, e.g.*, N.Y. Agric. & Mkts. Law § 294 (McKinney Supp. 1982); Wisconsin Agricultural Marketing Law, Wisc. Stat. Ann. § 96.01 (West Supp. 1983). Such legislation differs greatly from the Michigan Act. The state, through a system of marketing orders, essentially controls the price of a given agricultural commodity. This is in contrast to

A comparison of the very limited language of the Federal Fair Practices Act with the broad nonpreemption provisions contained in other federal statutes provides additional support for the position that Congress did not intend to grant the states authority to regulate inconsistently with the Federal Fair Practices Act. When Congress intends to have state law supplement or override federal law, it so provides explicitly.[10]

CONCLUSION

The decision of the Michigan Supreme Court misconstrues the Federal Agricultural Fair Practices Act. The Michigan court failed to recognize that this Act explicitly protects the right of producers to refrain from cooperative involvement. In addition to the explicit provisions of the Federal Fair Practices

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the Michigan Act in which private parties, without state control, establish the price and other marketing terms and conditions. Because of this state involvement, the validity of marketing order statutes has been upheld. *See, e.g., Parker* v. *Brown*, 317 U.S. 341 (1943); *Wickham* v. *Trapani*, 41 Misc.2d 749, 246 N.Y.S.2d 137 (Sup. Ct. 1966), *aff'd*, 272 N.Y.S.2d 6, 6 A.D.2d 216 (3d A.D. 1966).

[10] *See, e.g.*, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 2301, § 2311(b) (1982) ("Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law."); National Labor Relations Act, 29 U.S.C. § 151, § 164(b) (1982) ("Nothing in this subchapter shall be construed as authorizing agreements requiring membership in a labor organization as a condition of employment in any state . . . in which an exclusion . . . is prohibited by state . . . law."); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601, § 9652(d) (1982) ("Nothing in this chapter shall affect the obligations or liabilities . . . under . . . State law, including common law. . . .").

Act, this right is protected by the Capper-Volstead Act, the Sherman Act and the First Amendment. When the Federal Fair Practices Act is properly construed, it is apparent that provisions of the Michigan Act are in direct conflict with, and thwart the purpose of, the federal legislation. Accordingly, under the Supremacy Clause, those provisions of the Michigan Act should be declared invalid.

Respectfully submitted,

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